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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 641

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Southern Railway System, intervening plaintiff in the court below, appeals from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered June 8, 1966, upholding orders of the Interstate Commerce Commission which approved the proposed merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company and the

related acquisition of control by the merged company of the Louisville & Nashville Railroad Company. This statement is submitted by appellant, in compliance with Rules 13 and 15 of this Court, to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the District Court is not yet reported. Copies of that opinion and of the judgment of the District Court of the same date are set out as Appendix A, pp. 1a-50a, to the Jurisdictional Statement being filed simultaneously herewith by the Florida East Coast Railway Company. (The appendices to that Jurisdictional Statement are hereinafter cited as "FEC Appendix" or "FEC App.")

The report of the Interstate Commerce Commission, *Seaboard Air Line RR. Co.—Merger—Atlantic Coast Line RR. Co.*, December 2, 1963, appears at 320 I.C.C. 122. Copies of this report have been furnished for the convenience of the Court. The orders of the Commission dated December 2, 1963, and March 4, 1964, are set out as FEC Appendices E and F, FEC App. pp. 83a and 87a. The report of the Commission's hearing examiner was set forth as Appendix E, App. vol. II, to the Jurisdictional Statement filed by Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, *et al.*, in *Seaboard Air Line RR. Co.* v. *United States*, No. 425, October Term, 1965.

The *per curiam* opinion of this Court, 382 U.S. 154 (November 22, 1965), vacating the District Court's previous order, is set out as FEC Appendix B, FEC App. pp. 51a-53a.

The previous opinion of the District Court is reported at 242 F. Supp. 14 (M.D. Fla., May 13, 1965). The opinion is set out as FEC Appendix C, FEC App. pp. 54a-70a.

JURISDICTION

This action was instituted by the Florida East Coast Railway Company, pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to set aside orders of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 905, 49 U.S.C. § 5(2). Those orders approved and authorized, subject to certain conditions, the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company and the related acquisition of control by the merged company of the Louisville & Nashville Railroad Company. Appellant Southern Railway System, comprising the Southern Railway Company and its affiliates, intervened in the action as a party plaintiff in opposition to the merger, as did the Railway Labor Executives' Association and, more recently, the City of Tampa, Florida. The defendant Interstate Commerce Commission, represented by its General Counsel, appeared in support of its orders. The defendant United States of America, represented by the Department of Justice, appeared in opposition to the merger and was realigned as a party plaintiff. The Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company, the Atlantic Coast Line Company (a holding company controlling the Atlantic Coast Line Railroad Company), and the Mercantile-Safe Deposit and Trust Company (a trust company which in turn, as fiduciary, controls the Atlantic Coast Line Company) all intervened as

parties defendant in support of the Commission's orders and of the merger.[1]

The judgment of the three-judge District Court for the Middle District of Florida, denying the injunction sought by the plaintiffs and entering judgment in favor of the defendants, was dated and entered June 8, 1966. On June 14, 1966, that court stayed the operation and effective date of the ICC orders pending timely appeal to this Court and pending the final determination of such appeal. Notice of Appeal was filed in that court on August 8, 1966, by this appellant.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction include *United States* v. *Drum*, 368 U.S. 370 (1962); *Minneapolis & St. L. RR. Co.* v. *United States*, 361 U.S. 173 (1959); and *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

STATUTES INVOLVED

The statutory provisions governing approval by the Interstate Commerce Commission of the consolidation and merger of railroads are contained in Sections 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(f), and 5(11) of the In-

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[1] Short name forms will sometimes be used herein, as follows:

Coast Line—Atlantic Coast Line Railroad Company;
Seaboard—Seaboard Air Line Railroad Company;
Florida East Coast—Florida East Coast Railway Company;
L & N—Louisville & Nashville Railroad Company;
Southern—Southern Railway Company and its affiliates in the Southern Railway System;
Merged Company—Seaboard Coast Line Railroad Company, which would be the surviving corporation under the plan of merger;
Commission or ICC—the Interstate Commerce Commission.

terstate Commerce Act, 54 Stat. 905, 908, 49 U.S.C. § 5 (2) (a), (2)(b), (2)(c), (2)(f) and (11); and in the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1. The relevant provisions of the antitrust laws are contained in Sections 7 and 11 of the Clayton Act, 38 Stat. 731, 734, 64 Stat. 1125, 15 U.S.C. §§ 18 and 21, and in Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2. The texts of these provisions are set out in FEC Appendix D, FEC App. pp. 71a-82a.

QUESTIONS PRESENTED

1. Whether the Commission, in approving the proposed merger, applied proper legal standards for accommodating Section 5(2) of the Interstate Commerce Act with the antitrust legislation and rested its conclusion on adequate findings based on substantial evidence.

2. Whether the Commission fulfilled its obligation to "estimate the scope and appraise the effects of the curtailment of competition" that would result from the merger, particularly with respect to the monopoly the merger would create in central and western Florida in the transportation of the long-haul, bulk-loading commodities that account for some 75 per cent of the combined business of the merger applicants.

3. Whether the Commission fulfilled its obligation to compile an adequate record concerning the anticompetitive effects of the merger, and whether the court below erred in considering that, although such a record admittedly had not been compiled, the Commission's approval of the merger should not be disturbed.

4. Whether the Commission applied proper legal standards and made adequate findings in refusing to condition its approval of the merger on the sale or lease to another railroad of one of the merged carrier's lines of track running into central and western Florida, when such a condition would have preserved competition and avoided the monopoly that would otherwise result from the merger.

5. Whether the Commission applied proper legal standards and made adequate findings in refusing to condition its approval of the merger on divestiture by the merged company of its controlling interest in the Louisville & Nashville Railroad, in view of the substantial amount of traffic interchanged with the L & N or its competitors and the plan of the merged company to have itself and the L & N favor each other, in preference to competing railroads, in allocating that interchange traffic.

STATEMENT

1. The Merger Applicants and the Proposed Merger

Seaboard and Coast Line, the merger applicants, are two of the three major railroads in the southeastern United States.[2] They are both healthy and prosperous. (320 I.C.C. at 146, 149.)[3] During the years 1955 to 1962, Seaboard had annual revenues averaging $160.3 million and annual net income averaging $16.4 million.

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[2] The third is appellant Southern. The L & N, controlled by Coast Line, and to be controlled by the merged company under the plan approved by the Commission, is a fourth major railroad operating in the southeast, as well as in other parts of the country.

[3] Among the nation's class I railroads, Seaboard and Coast Line in 1961 ranked 9th and 12th, respectively, in total net railway operating income, and 5th and 9th in income per mile of road. Ex. H-234.

Coast Line had annual revenues averaging $165.7 million and annual net income averaging $11.3 million. (*Id.* at 148-149, 257-265.) The tonnage and revenues of both railroads from the transportation of their principal commodities have been increasing significantly.[4] Both roads operate in the six-state area of Virginia, North and South Carolina, Georgia, Alabama, and Florida, where they serve many points in common and compete for the same types of business. Within this area, according to their own evidence, they compete with each other for 33.4 per cent of their combined tonnage traffic, producing about 48.5 per cent of their combined revenues. (320 I.C.C. at 164; Ex. H-66; Ex. H-68.) In other words, the two railroads are alternate competitive choices each year for an aggregate of 865,934 cars of freight, yielding revenues of $131 million. (320 I.C.C. at 163-164.) Such is the extent of the competition that would be eliminated by the merger in the six-state area.

The merged company would be by far the largest railroad in that area, operating more than 54 per cent of the total railroad mileage. (Southern, its nearest competitor, would have about 34 per cent.) (320 I.C.C. at 163.) The merged company would have assets exceeding one billion dollars; annual operating revenues (based on the 1955-1962 average) of $326 million; and annual net income of $27.7 million. (*Id.* at 146-149, 254.)

In Florida, the merged carrier would operate approximately 81 per cent of the total railroad mileage.

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[4] Between 1946 and 1959, carriage of the applicants' nine principal commodities (in tonnage terms) rose by 100 per cent in volume and by more than 150 per cent in revenues. 320 I.C.C. at 232.

(320 I.C.C. at 163.) The second largest railroad in the state would be the Florida East Coast, with about 13 per cent.

A special situation would prevail in the central and western portions of Florida. Here Seaboard and Coast Line are the only railroads; here the merger would eliminate all rail competition and create a monopoly. (320 I.C.C. at 164-165.) This is a singularly large, growing, and freight-productive area. Its rate of economic growth exceeds that of Florida as a whole, which in turn exceeds that of any other state in the Southeast and perhaps any other state in the Nation. (Ex. H-155, *e.g.*, pp. 156-165.) The area is especially significant as a market for rail transportation. It accounts for at least 35 per cent (Ex. H-36, Statement T; Ex. H-38) and probably much more (the record does not indicate how much) of the combined freight tonnage of the applicants. It is a principal source, and probably *the* principal source, of the nine commodities that account for more than 75 per cent of the applicant's combined tonnage and some 45 per cent of their combined freight revenues. (Ex. H-38; Ex. H-155.) These are heavy, bulk, long-haul commodities as to which, in the words of the District Court (FEC App. p. 20a), "railroads enjoy a decided economic advantage over all other modes of transport." Such is the area in which the merged carrier would have a monopoly of rail transportation.

2. The Commission Proceedings and Report

In the proceedings before the Commission, the proposed merger was opposed by a variety of interests, including the Department of Justice and other public agencies, competing railroads such as appellant Southern, railway labor, shippers, and others. Although

there were differences in emphasis and approach, the opposition focused chiefly on the widespread elimination and curtailment of rail competition, and the consequent adverse effects on the public interest, that the merger would produce.

While Southern participated in these broadly based objections, its opposition was directed principally at the severe anticompetitive effect the merger would have in central and western Florida. Southern opposed the merger unless it were conditioned on a requirement that the merged carrier lease or sell to Southern or some other qualified railroad, on reasonable terms, one of the merged carrier's several lines of track running into central and western Florida from Jacksonville and the north. Such a condition, by enabling the preservation of rail competition and avoidance of monopoly in central and western Florida, would have disarmed one of the principal public-interest objections to the merger.

Southern took the position also that the merger could not properly be approved unless conditioned on a requirement that the merged company divest itself of its controlling interest in the Louisville & Nashville Railroad. This position was based on evidence from the merged company's own potential officers that the company intended to exploit its control of the L & N (as Coast Line, which presently controls the L & N, has done) to bring about reciprocal favoritism in allocating the large volume of interchange traffic between the area to be served by the merged carrier and the territory to the west served by the L & N.[5]

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[5] Statement M, pp. 11, 13, 20; Statement A, p. 31; Statement B, p. 30; Ex. H-21, pp. 11-12; Tr. 17, 474, 550-551, 1286-1287.

The Commission, in a majority report by Commissioner Murphy over the dissents of Commissioners Webb and Tucker, approved the merger with certain conditions and rejected both of these conditions proposed by Southern.

The Commission recognized that the applicant railroads "have enjoyed a moderate degree of prosperty over the past several years" and are "currently in a relatively healthy condition"; that their earnings record is "impressive"; and that their rate of return on investment is "above the average norm for class I railroads." (320 I.C.C. at 146, 149.) The Commission recognized that the merger would eliminate competition between the applicants on the 33.4 per cent of their combined freight tonnage, yielding annual revenues of $131 million, for which they presently compete. (*Id.* at 163-164.) It emphasized, however, that 19.7 per cent of the combined tonnage "would remain competitive with other railroads after the merger" (*id.* at 163, 164), so that rail competition would be totally eliminated on only "about 13.7 percent of the total combined freight tonnage." (*Id.* at 164.) Using the latter amount, the Commission stated (in its only "market share" estimate) that

> "only 1.2 percent of the total intercity freight traffic from all modes of transport would cease to be subject to rail competition in the southern religion after the merger, leaving more than 98 per cent of the total intercity freight traffic unaffected by the merger." (*Id.* at 164; see also *id.* at 211.)

The Commission discussed the anticompetitive effects of the merger generally in terms of "all modes of transport" and in terms of the "southern region"

or the "Southeast." Thus, it spoke of "the over-all competitive picture in the southeastern region" (320 I.C.C. at 166), and stated:

> "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, the sum of all of the competitive transportation facilities that will remain available in this broad area." (*Id.* at 166.)[6]

The Commission recognized that the situation "in the central and western portions of Florida is unique" in that no other railroad serves that area. (320 I.C.C. at 164.) The Commission then described the existing situation in that area as "imperfect monopoly" (*id.* at 164-165), and found that the loss of competition there as a result of the merger "is largely a matter of degree," inasmuch as rail monopoly "would merely supplant the duopoly which has long existed there . . . ." (*Id.* at 165.)[7] The Commission recognized that "there will be a significant reduction in rail competition in Florida" (*id.* at 166), but asserted that "the over-all reduction in rail competition in the Southeastern States viewed as a whole will be relatively moderate . . ." (*id.* at 166), and was able to "conclude and specifically find" that "the reduction of rail competition caused by the proposed merger will not be substantial." (*Id.* at 167.)

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[6] See also, *e.g.*, 320 I.C.C. at 212: "the region served by the applicants."

[7] This statement, unexplained by the Commission, was interpreted as follows by the court below: "The Commission appears to have assumed that the equivalent of a conspiracy to fix prices in Florida already exists." (FEC App. pp. 23a-24a.)

As already indicated, the Commission heavily emphasized intermodal competition in the transport industries, and did so to the near-exclusion of any consideration of intramodal rail competition. The Commission stated, for example, that "the necessity for the preservation of intramodal rail competition has gradually lost much of its significance." (320 I.C.C. at 210; see also *id.* at 166.) While stressing intermodal competition, the Commission at no point found that such competition is significantly applicable to the bulk, long-haul commodities that account for most of the applicants' freight tonnage and that originate and terminate largely in central and western Florida where the merger would create a monopoly. Of the nine bulk-loading commodities that represent more than 75 per cent of the applicants' combined tonnage (*id.* at 231-232; FEC App. p. 23a n. 30), the Commission took note of only one. This was phosphate rock, the No. 1 commodity in tonnage terms for each of the applicants; the Commission described it as "essentially a commodity normally handled by rail." (320 I.C.C. at 151.)

Concluding to approve the merger, the Commission found that the benefits that would assertedly result, "foremost" among which were savings of some $20 million a year to the merged carrier through "elimination of duplicate facilities and functions" (320 I.C.C. at 206-207), would outweigh the anticompetitive effects. (*Id.* at 167.) In so concluding it relied on the premise that "primary emphasis must be placed upon the public advantages that will accrue from the merger . . . ." (*Ibid.*; see pp. 24-25 *infra*.) So far as the anticompetitive effects were concerned, the Commission found, as noted above, that they "will not be substantial." (*Id.* at

167). And, as will be shown below (pp. 28-38), it did not estimate the scope or appraise the effects of the rail monopoly that would be created in central and western Florida.

With respect to the conditions to be imposed on approval of the merger, the Commission made clear that it had considered this question with regard, not to central and western Florida, but to "the competitive situation in the Southeast." (320 I.C.C. at 188; see also *id.* at 184.) The Commission said its objective in selecting the conditions was to "establish two balanced competitive systems in that area" (*id.* at 188) and to "create more balanced competition among the several rail carriers in the southeastern seaboard area, and thus benefit the public generally." (*Id.* at 184.) Yet the Commission rejected the track-transfer condition proposed by Southern which would have preserved two-carrier rail competition in central and western Florida. It did so on the ground that such a transfer would result in "an invasion of territory now adequately served by the applicants" (*id.* at 187), and "would deprive the merged company of substantial revenues." (*Ibid;* see also *id.* at 209).

The proposed condition requiring the merged company to divest itself of control of the L & N was also rejected. The Commission based this ruling in large part on its expectation that competitors of the L & N would be able to retaliate against the merged company for any preference it might give the L & N. (320 I.C.C. at 188-189:) The standard the Commission applied in determining to deny this condition (and the track-transfer condition as well) turned on whether the proposed requirement was "necessary in the public interest." (*Id.* at 189; see also *id.* at 209.)

3. The First District Court Decision and This Court's Disposition Thereof

The District Court, on its first review of the Commission's orders approving the merger, set them aside. (242 F. Supp. 14 (M.D. Fla. 1965); FEC App. C, pp. 54a-70a.) It did so on the ground that "the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger." (242 F. Supp. at 20; FEC App. p. 62a.) On appeal, this Court, in a *per curiam* opinion, summarily vacated the District Court's judgment and remanded the case there. (382 U.S. 154 (1965); FEC App. B, pp. 51a-53a.) The Court reiterated its statements in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, 87 (1944), and *Minneapolis & St. L. RR. Co.* v. *United States*, 361 U.S. 173, 186 (1959), that the Commission is "obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]" so as to achieve the "accommodation of § 5(2) and the antitrust legislation." (382 U.S. at 156; FEC App. p. 53a.) The Court then stated:

> "The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest'." (382 U.S. at 156-157; FEC App. p. 53a.)

Stating that "whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence are questions for the trial court in the first instance," the Court

vacated the judgment and remanded the case to the District Court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." (382 U.S. at 157; FEC App. p. 53a.)

The Solicitor General of the United States had suggested that course. In so suggesting he pointed out, in a Memorandum filed with the Court, that he did "not contend that the Commission's analysis of competitive effects was adequate." On the contrary, he explained, "The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this case were *not* adequate, and we would renew that contention on a remand." (Memorandum for the United States, Nos 425 and 555, October Term, 1965, pp. 4-5 (emphasis in original).) The Solicitor General called attention "emphatically" to

> "the need for adequate standards in the appraisal of the competitive effects of rail mergers—standards drawn not merely from the Commission's specialized knowledge of railroad and transportation conditions and practices, but from sound economic principles of competition and from the experience of the courts in analyzing anticompetitive consequences of mergers under the antitrust laws . . . ." (*Id.* p. 7; see also *id.* p. 9.)

4. The District Court's Decision Now Being Appealed

The District Court, on remand, has now upheld the Commission's approval of the merger. (FEC App. pp. 1a-50a.)

The court stated that it had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida." (FEC App. p. 24a.) Presumably for this reason, the

court described the case as presenting "a head-on collision between the antitrust laws and the Interstate Commerce Act." (*Id.* p. 4a) The court apparently read this Court's *per curiam* opinion as holding that antitrust market-definition tools have no proper role in a railroad merger case, inasmuch as the Commission is not required to take the ultimate step of concluding whether or not the merger would violate the antitrust laws.[8]

The court recognized the importance of the impact the merger would have in Florida. It stated that "these railroads receive a substantial increment of their revenue from traffic originating in Florida," and that "It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." (FEC App. p. 23a.) The court read the Commission's report as having assumed "that the equivalent of a conspiracy to fix prices in Florida already exists," and expressed the view that intramodal competition, even as to rates, is still an important factor in the railroad industry. (*Id.* pp. 23a-24a.) The court then pointed out that *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904), "may be viewed as advancing the proposition that a merger to solidify a conspiracy is illegal under the antitrust laws." (FEC App. p. 24a.) At this point the court expressed its confident view, as quoted above, that under the anti-

[8] "It seems pointless to say that the Commission must employ market definition tools calculated to show whether an antitrust violation has taken place, and when it reaches the point where a conclusion may be properly drawn, it may then stop since it need not draw any conclusions. But this illogical mode of behavior would be the result of following both the plaintiff's rationale and the Supreme Court's recent opinion in this case." (FEC App. pp. 13a-14a.)

trust laws "the instant merger would fail at least as to Florida." (*Ibid.*)

The court took note of the ICC report, approving a motor-carrier merger under Section 5(2), which this Court upheld in the *McLean* case, *supra*, 321 U.S. 67. The court pointed out that that case differed from the present one because of "the substantial competition that remained after the merger" in that case, and noted that the Commission there had "analyzed the remaining competition . . . in great detail." (FEC App. pp. 31a-32a.) In the present case, the court found:

> ". . . the Commission looked at and weighed all the factors it had examined in [McLean] . . . . The ICC considered those areas in Florida where a monopoly would be created, including the size of the cities involved and their relative importance." (*Id.* p. 35a.)[9]

With respect to phosphate rock and the other eight bulk-loading commodities that account for some 75 per cent of the applicants' tonnage, the court held clearly that these are rail-oriented commodities substantially insulated from intermodal competition:

> "It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other

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[9] The court was mistaken. The Commission noted that the population of Tampa exceeds 200,000 (320 I.C.C. at 164), but did not otherwise consider the "size" or "relative importance," or even the names, of cities in those areas in Florida where a monopoly would be created. It did refer to the average population of "17 communities *outside of Florida* which would be without competitive rail service after the merger," and to the percentage of the population of *"the 6-State area"* comprised in the 88 counties in that area which would be without such service. (320 I.C.C. at 164 (emphasis added).)

modes of transport on heavy, long, bulk-haul products in central and western Florida." (FEC App. p. 20a; see also *id.* pp. 18a-19a.)

The court several times expressed its dissatisfaction with the record made before the Commission, particularly as it related to the anticompetitive effects the merger would have in central and western Florida. (FEC App. pp. 19a, 20a, 23a n. 30, 41a n. 36.) The court was content, however, to place the blame for this on the parties, particularly the Department of Justice. (*Id.* pp. 36a, 38a-39a, 41a n. 36.) The court thus did not consider whether the case should be remanded so that the Commission might remedy the inadequacies of the record.

Citing this Court's opinion in *McLean, supra,* 321 U.S. at 76, the court agreed with the Commission that Congress had directed the ICC to give "primary weight" to the four factors listed in Section 5(2)(c) of the Interstate Commerce Act, which do not in terms include the factor of antitrust policy. (FEC App. p. 37a.)[10] The court determined that the ICC here "has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits," and that the record supports the Commission's findings, adding:

> "The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions." (*Id.* p. 38a.)

[10] What this Court said at the cited page in *McLean,* quoting the statute, was that the Commission is required to "give weight" to those four factors, "among others." (321 U.S. at 76; 49 U.S.C. § 5(2)(c).)

The court concluded that the Commission's orders must be sustained because it had applied the proper standards, "exhibited . . . familiarity with the complex problems in the transportation industry," and "explained its reasoning and supported its application of that reasoning by substantial evidence." (FEC App. p. 50a.) At no point did the court find or conclude that the Commission, in considering the anti-competitive effects of the merger, had made adequate findings.[11]

THE QUESTIONS ARE SUBSTANTIAL

This is the first of the current wave of great railroad-merger cases to be decided by the ICC and presented to this Court. As stated by the Solicitor General upon the previous hearing, it involves "a proposed merger of great magnitude and far-reaching implications for the future structure of the railroad industry."[12] Waiting in line behind this case are, in the words of ICC Commissioner Webb, "pending consolidation cases involving practically all of the large class I railroads in this Nation."[13] The magnitude of the merger and the precedential nature of the case would themselves be more than enough to warrant plenary review by this Court, so as to assure that the Commission in approving the merger had applied correct standards, made adequate findings, and compiled a complete record.

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[11] The court did not discuss either of the proposed conditions which Southern contended that the Commission had wrongly denied. The court stated, however, that it had considered "the arguments which we have discussed and all other arguments in this case." (FEC App. p. 50a.)

[12] Memorandum for the United States in Nos. 425 and 555, October Term, 1965, p. 6.

[13] 320 I.C.C. at 218 (dissenting opinion).

But that is not all. The legal question here presented —the "accommodation" of Section 5(2) of the Interstate Commerce Act and the antitrust legislation—is especially substantial in this case because the impact of antitrust considerations is especially strong. In the District Court's view, the case presents "a head-on collision between the antitrust laws and the Interstate Commerce Act" (FEC App. p. 4a), inasmuch as the court had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida." *Id.* p. 24a; see also *id.* p. 29a.

The anticompetitive effects of the merger are by any account very substantial. Competition would be eliminated between the applicants on more than one-third of their combined traffic, and an absolute rail monopoly would be created in a singularly large, growing, freight-productive, and rail-oriented market. As Commissioner Webb said in dissent, "This is the first case in the current series of proposed railroad unifications in which a vast amount of beneficial competition between applicants would be eliminated." 320 I.C.C. at 218. It is surely appropriate in such a case for this Court to review in plenary fashion the accommodation the ICC has made between the antitrust laws and the Interstate Commerce Act, and the account it has taken of the national antitrust policy of the United States.

On two previous occasions since 1940, when Section 5(2) was amended to its present form, this Court has been asked to review the Commission's approval of a merger under that section. In both cases the Court accepted the appeal for plenary review. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944);

Minneapolis & St. L. RR. Co. v. *United States*, 361 U.S. 173 (1959). The question presented by the instant appeal is unquestionably more substantial, in both legal and economic terms, than the question in either of those cases.[14]

Finally, plenary review of the Commission's approval of the merger in this case is in order because, as we shall proceed to show, that approval should not be allowed to stand. The Commission applied erroneous standards for determining whether the merger was in the public interest—standards misconstruing and disparaging the antitrust policy of the United States. The Commission made inadequate findings, and thus did not fulfill its obligation to "estimate the scope and appraise the effects of the curtailment of competition" that would result from the merger. The Commission failed, as the District Court recognized, to compile a complete record with respect to the anticompetitive effects of the merger. The Commission applied erroneous standards and made inadequate findings in refusing to attach certain conditions if it was to approve the plan at all. And the Commission erred in giving its approval without such conditions because, on this record,

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[14] The question in *Minneapolis* was which of several railroads should be allowed to acquire a small "bridge carrier" whose owners were determined to sell. See, *e.g.*, 361 U.S. at 178. *McLean* was not a railroad but a motor-carrier case. While the end-to-end consolidation there approved was relatively large—combined assets of $8 million and annual revenues of $19 million (321 U.S. at 71)—it was not in a class with this case. Moreover, as the District Court here pointed out, the anticompetitive effects in *McLean* were not nearly so severe as they are here: ". . . [S]evere 'elimination of competition,' such as here involved[,] . . . distinguishes the *Associated-McLean* case, *supra*, where substantial competition remained." FEC App. p. 36a; see also *id.* pp. 31a-32a.

the expected public benefits from the merger could not properly be found to outweigh the massive destruction of beneficial competition.

1. The Commission's Erroneous, Competition-Disparaging Standard.

The Commission's order will be set aside by this Court if "the standards and criteria employed by the Commission were not the proper ones . . . ." *ICC* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961). Specifically, when this Court reviews an ICC order approving a merger under Section 5(2), two principal issues are "the propriety of the standards applied and whether due consideration was given to the antitrust laws and policies . . . ." *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 77.

In this case the standards and criteria employed by the Commission were not the proper ones, and due consideration was not given to the antitrust laws and policies.

The proper standard was set forth by this Court in its *per curiam* opinion on the previous appeal in this case. The Court there reiterated that the Commission's task is to "accommodate" the Interstate Commerce Act and the antitrust legislation, and that, to accomplish this, it must "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]." 382 U.S. at 156; FEC App. pp 52a-53a. The Court also described "the ultimate question" in this case as "whether the merger would be consistent with the public interest despite the foreseeable injury to competition." *Ibid.* Under this standard, as the District Court recognized, "There is and could be no dispute that, in determining whether a

given merger is in the public interest, the Commission should take into account the national antitrust policy of the United States." (FEC App. p. 11a.)

What is "the national antitrust policy of the United States"? As the District Court observed, its essence was clearly stated by this Court in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958). The Court there pointed to

> "... the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress ...." *Id.* at 4; quoted by the District Court at FEC App. p. 12a.

It is clear enough why the ICC is obliged to give weight to this policy in making its "public interest" determination under Section 5(2). Apart from the "among others" provision in Section 5(2)(c), competition contributes to the "adequate transportation service to the public" which is the first of the four factors expressly listed in that subsection. Moreover, competition furthers the National Transportation Policy in its objective "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers ...." 49 U.S.C. preceding § 1.[15]

The Commission in this case, however, took the position that competition is something apart from and opposed to a sound transportation policy. This point of view animates and pervades the report. The Commis-

[15] As Commissioner Webb observed here in dissent, the past 20 years of antitrust law and policy have seen a "growing realization that the public interest standards of regulation and faith in competition are more often compatible than antithetical." 320 I.C.C. at 216.

sion's premise, for example, was that its task required it to resolve "the *conflicting* considerations of section 5(2) of the act and the antitrust legislation" (320 I.C.C. at 167)—"the numerous *conflicting* considerations that are *inevitably* involved." *Id.* at 206 (emphasis added). The Commission either ignored or disagreed with this Court's view that it is possible, and obligatory, to *accommodate* the two policies.[16]

The Commission's view led it to disparage competition as an element of the public interest and to employ a standard avowedly biased in favor of approving the merger. This is seen in the Commission's candid statement of its guiding criterion:

> "In resolving the conflicting considerations of section 5(2) of the act and the antitrust legislation, primary emphasis must be placed upon the public advantages that will accrue from the merger, including improved services, safer operations, lower costs, and other potential benefits that further the objectives of the national transportation policy." 320 I.C.C. at 167

By placing "primary emphasis" on the public advantages expected to accrue "from the merger," and ignoring the fact that the benefits of competition also "further the objectives of the national transportation

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[16] On April 27, 1966, after argument of this case in the District Court, the Commission announced its decision in the *Great Northern-Northern Pacific* merger proceeding, Finance Docket No. 21478, —— I.C.C. ——, decided March 31, 1966 (mimeograph opinion). There, on facts quite comparable to those presented here, the Commission disapproved a merger between prosperous and substantially parallel railroads. In so doing the Commission expressly recognized what it here ignored—that it "is not permitted to depreciate the values of competition which are reflected in the financial health of the merger applicants and in adequate transportation service to the public." Mimeograph opinion, p. 92; see also *id.* pp. 58, 88, 91, 97-98.

policy," the Commission unashamedly weighted the scales in favor of the merger and against competition. [17]

In *ICC v. J-T Transport Co., supra,* 368 U.S. 81, the Commission's order was set aside because the Commission had "loaded one of the scales" and "indulged in a presumption" in favor of one statutory criterion at the expense of another to which Congress had directed it to give equal weight. 368 U.S. at 88-90. The Commission here has done precisely the same thing.

The Commission's unwonted disparagement of competition manifests itself in various forms throughout the report. The Commission relied, for example, on the proposition that "excessive competition between carriers may well result in serious injury to shippers as well as to the public generally." 320 I.C.C. at 167. Yet it made no findings, and on this record could have made none, that the existing competition between Seaboard and Coast Line is in fact "excessive" or injurious to shippers or the public. [18]

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[17] In the *Great Northern-Northern Pacific* case, see p. 24 n. 16 *supra,* the Commission repudiated this approach. The examiner in that proceeding had erred, the Commission held, in believing "that the Transportation Act of 1940 continued the policy of favoring railroad mergers . . . .":

> "No such policy is expressed in section 5. To interpret section 5 as implying such a policy is a perversion of legislative history and intent. The public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger." Mimeograph opinion, p. 89.

[18] The facts and report in this case contrast significantly in this respect with the proceeding in which the Commission, on April 6, 1966 (announced April 27, 1966) approved the merger of the *Pennsylvania* and *New York Central* railroads. 327 I.C.C. 475. There the Commission made and relied on specific findings that competition between the applicants was excessive, inconsistent with their own financial health, and injurious to the public. 327 I.C.C. at, *e.g.*, 506, 512, 519.

The Commission further took the position that the regulated nature of the railroad industry leaves little if any role for intramodal competition.[19] It stated that railroads and public utilities "are subject to equally stringent regulation" (320 I.C.C. at 167), and justified its approval of the merger by citing this Court's statement in *McLean*, 321 U.S. at 85, that the regulatory process provides "an effective safeguard against the evils attending monopoly . . . ." 320 I.C.C. at 212. When this court made that statement in *McLean*, it was referring to regulation as a factor that *Congress* "presumably took into account" when it "relieved participants in appropriate mergers from the requirements of those [antitrust] laws." 321 U.S. at 85. It was not authorizing the Commission to invoke regulation as a basis for discounting the value of competition a second time in determining whether or not a merger was "appropriate."

The Commission also made inadequate findings as to the existence and nature of competition between railroads. While railroads are indeed regulated, as are the "gas, electric, and telephone utilities" to which the Commission assimilated them, they are not, of course, subject to "equally stringent regulation." Competition exists among railroads, as it does not among those necessarily monopolistic utilities; it exists, moreover, with respect not only to service but to rates. The Dis-

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[19] Fulda, *Antitrust Aspects of Recent Transportation Mergers*, 48 Minn. L. Rev. 723, 739-40 (1964), comments as follows on the Commission's decision in this case:

> "'. . . intra-mode rail competition is generally belittled as irrelevant, it is practically ended in Florida, and in the other areas involved it is weakened to an unprecedented degree.'"

trict Court, unlike the Commission, recognized this.[20] In the *Great Northern-Northern Pacific* case (see p. 24 n. 16 *supra*), the Commission did too. In contrast to its performance here, it there recognized, described, and attributed important value to the competition engaged in by two railroads serving the same area.[21]

This Court was fully aware that railroads are a regulated industry when it held, in *McLean* and *Minneapolis* and its *per curiam* opinion in this case, that the Commission must "estimate the scope and appraise the effects of the curtailment of competition," and must give them weight in determining whether the merger should be approved. In this case, by using regulation as an excuse to ignore and discount competition between railroads, the Commission exceeded the bounds of its discretion.

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[20] ". . . The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the ICC from the antitrust laws. 49 U.S.C.A. § 5b.

"For our purposes, it is important to remember that the Reed-Bulwinkle Act preserves the potential of competition since individual railroad initiative is a legal requirement. If the instant merger is permitted, then that initiative will be irrevocably lost. . . ." FEC App. p. 24a.

[21] "Although regulation imposes certain constraints upon intramodal rail competition, competitive ratemaking is far from dormant. Subject to the requirements of the Act, there is a broad zone of reasonableness within which the discretion of carrier management and the interplay of competitive forces operate. . . ." Mimeograph opinion, p. 81.

". . . the anticompetitive consequences of the merger would not be confined to stations where applicants are directly competitive. Today, rate innovations and service improvements by one of the applicants create strong pressure from shippers for similar treatment by the other. These indirect benefits of competition between the Northern Lines cannot be measured statistically but they are real." *Id.* p. 83.

2. The Failure to Make Adequate Findings on the Scope and Effects of the Curtailment of Competition.

The Commission was obliged "to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]." 382 U.S. at 156; FEC App. pp. 52a-53a. The Commission was also obliged to make adequate findings on this issue. As this Court said in remanding this case to the District Court, the Commission is authorized to approve the merger "*if it makes adequate findings* in accordance with the criteria quoted above that such a merger would be consistent with the public interest." 382 U.S. at 157; FEC App. p. 53a (emphasis added). See also *McLean, supra,* 321 U.S. at 88; *Minneapolis, supra,* 361 U.S. at 189; Administrative Procedure Act, Section 8(b), 5 U.S.C. § 107(b).[22]

The Commission in this case did not estimate the scope and appraise the effects of the curtailment of competition that would result from the merger. It did not make adequate findings as to the anticompetitive effects of the merger.

The Commission misconstrued even the basic meaning of the "curtailment of competition" whose scope it had to estimate and whose effects it had to appraise. As noted at p. 10 *supra,* the Commission recognized that "33.4 percent of their total tonnage was competitive between these applicants." 320 I.C.C. at 164. But because "19.7 percent of their total tonnage would remain competitive with other railroads after the merger" (*ibid.*), the Commission dismissed this 19.7 per

[22] See also, *e.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); *ICC* v. *J-T Transport Co.,* 368 U.S. 81, 93 (1961).

cent from further consideration, and concerned itself only with the 13.7 per cent of the applicants' tonnage that would be totally foreclosed from rail competition. Using this figure as the measure of the competition "eliminated by the merger," the Commission was able to make its pivotal and lonely finding that the competition eliminated would amount to "only 1.2 percent of the total intercity freight traffic from all modes of transport" in the "southern region." 320 I.C.C. at 164.

The Commission thus proceeded on the theory that competition is "curtailed," within the meaning of this Court's directive, only when it is totally abolished, and not when it is reduced to however substantial a degree. As the dissenting Commissioners pointed out, "If this idea were pressed to its logical conclusion, no rail merger could offend the policy of the antitrust laws so long as two competitors remained in the relevant market." 320 I.C.C. at 229. That such an approach does not comply with this Court's directive is made clear by the *McLean* and *Minneapolis* cases. In both, this Court, in approving the Commission's competitive analysis, specifically pointed out that the Commission had considered the extent to which competition would be "diminished" by the merger. *McLean,* 321 U.S. at 88; *Minneapolis,* 361 U.S. at 188.[23]

The Commission's competitive findings were inadequate also because of its failure to estimate the scope

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[23] The Commission in the recent *Great Northern* case, see p. 24 n. 16 *supra,* recognized the error of its approach here:

> ". . . Nor may we limit our consideration of the traffic to that which . . . is 'exclusively competitive.' No such limitation is contained in the law. We must consider all traffic for which these lines compete and as to which their competition will be eliminated." Mimeograph opinion, p. 92.

and appraise the effects of the curtailment of competition with respect to central and western Florida—the important economic area where a monopoly would be created—and with respect to the bulk commodities that originate or terminate there and account for a dominant part of the applicants' tonnage.

The Commission has conceded that it was obliged to give separate consideration to the anticompetitive effects the merger would have in central and western Florida.[24] The obligation was not met. The Commission did not make adequate findings as to the anticompetitive effects in this area simply by stating that there would be a "monopoly" and a "significant reduction in rail competition in Florida," and that the monopoly would merely supplant the existing "duopoly." FEC App. pp. 21a, 24a. To "estimate the scope" and "appraise the effects" of the curtailment of competition, the Commission was required to go beyond vague

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[24] Commission counsel in their brief on remand in the District Court stated:

> "The East Coast and those allied with it make much of the fact that Florida and more particularly the central and western portions of that State comprise an area worthy of the Commission's separate consideration in its appraisal of the anticompetitive effects of the proposed merger—as they phrase it, a separate, relevant geographic market or sub-market. *We would concede that it is,* but we would also insist that the Commission did indeed determine what the anticompetitive effects of the considered transaction would be in that area." Supplemental Brief of the ICC, p. 15 (emphasis added).

The District Court evidently agreed, stating:

> ". . . these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." FEC App. p. 23a; see also *id.* pp. 18a-19a, 24a.

terms and make some measurement—to say "how much." See *Michigan Consolidated Gas Co.* v. *FPC*, 283 F. 2d 204, 218 (D.C. Cir. 1960).[25] It was required, for example, to consider, and show that it had considered, the *size* of the "monopoly"; it was required to indicate the extent of the "significant" reduction.

The need to use quantitative terms in "estimating the scope" of the curtailment of competition was recognized by the Commission with respect to the entire "southern region," where it produced the figure of 1.2 per cent of the total intercity freight traffic. 320 I.C.C. at 163-64. With respect to central and western Florida, however, the Commission made no "estimate."[26] On the most basic question of all, it made no finding, even in asolute terms, as to the amount of traffic carried by the applicants, and hence the amount

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[25] See also *Saginaw Broadcasting Co.* v. *FCC*, 96 F.2d 554, 563 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938); *Democrat Printing Co.* v. *FCC*, 202 F.2d 298, 302 (D.C. Cir. 1952); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437, 444-45 (D.C. Cir. 1949).

[26] Compare the *Great Northern* case, p. 24 n. 16 *supra*, where the Commission, noting its obligation "to measure the competitive impact of the proposed merger in terms of the most relevant areas and the principal types of commodities transported" (Mimeograph opinion, p. 82), identified the area "where vigorous intramodal competition exists and is threatened" (*id.* p. 76), and then measured the traffic for which competition would be curtailed in that area as a percentage of the applicants' total tonnage and revenue. *Id.* p. 83.

The District Court here, in its desire to credit the Commission with some quantitative analysis of the monopoly area, stated that the Commission had considered "the size of the cities involved and their relative importance." FEC App. p. 35a. However, as pointed out at p. 17 n. 9 *supra*, the court was mistaken.

of competition to be eliminated, in that area.[27] Indeed, as the District Court admitted, the record made such a finding impossible:

> "The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk products originating in Central and Western Florida." FEC App. p. 23a n. 30.

Nor does the record support, or the report contain, estimates or appraisals of the curtailment of rail competition in central and western Florida in relation to the total freight moved by all modes in that area, in relation to the total amount of competition that would be foreclosed by the merger in all areas, or in relation to anything else.[28]

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[27] The Commission did produce, but only for Florida as a whole, a count of stations at which Seaboard and Coast Line both maintain agents, and concluded therefrom that "the number of Florida points at which there has been no competition is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed." 320 I.C.C. at 165. Apart from the unsupported assumption that the applicants compete only at points where both maintain agents (compare *Great Northern*, p. 83, quoted at p. 27 n. 21 *supra*), and apart from the statute's concern with competition to be eliminated rather than competition already lacking (see *Great Northern*, p. 92), another fatal defect in this approach was pointed out in the Commission's *Great Northern* report (p. 76):

> "Without some indication of the amount of traffic generated at stations without the . . . [relevant competitive area], the mere recitation of the number of common points at which competition will either be reduced or eliminated entirely by the unification, does not indicate whether the effect of the proposed merger on competition would be substantial or insignificant."

[28] In a further effort to read some substance into the Commission's remarks concerning Florida, the District Court apparently interpreted "duopoly" as meaning "the equivalent of a conspiracy to fix prices in Florida." FEC App. p. 24a; see p. 11

With respect to the bulk commodities that account for 75 per cent of the applicants' tonnage, the Commission has made the qualified concession that, *if* the record showed that railroad transportation of these commodities was "effectively insulated" from intermodal competition, the Commission would have been obliged to make more specific findings as to the effect of eliminating the competition between the applicants for the carriage of these commodities. The Commission argues, however, that no such obligation arose, because the record showed "massive intermodal competition" for the transport of these commodities.[29]

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n. 7 *supra*. The term is so vague that this interpretation is probably as reasonable as any. If such a conspiracy exists, however, the Commission was certainly obliged to consider the question before allowing the conspirators to merge. See the District Court's opinion (FEC App. p. 24a), citing *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904); see p. 16 *supra*. In any event, as the Commission conceded in the District Court (Supplemental Brief of the ICC, p. 14), its order must be set aside if its findings on competition were "vague or insufficient." See *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 (1942).

[29] Commission counsel in their brief on remand in the District Court stated:

> "If the record in this case had established that the applicant railroads' transportation of bulk commodities was effectively insulated from the competition of other modes, the Commission might have been obliged to make more specific findings of the effect of eliminating what rail competition exists in the movement of such commodities. However, the Commission is only required to determine issues posed by the record. In the absence of a showing that the applicants are immune from intermodal competition on a substantial segment of their traffic, the Commission was under no duty to analyze competitive consequences on a commodity-by-commodity basis. Here, the record clearly shows that, even in the transportation of bulk commodities, the applicant railroads experience massive intermodal competition . . . ." Supplemental Brief of the ICC, pp. 28-29.

Several conclusions follow from this. One is that the Commission does not contend that it made adequate findings as to the curtailment of rail competition in the carriage of the bulk commodities; its position is that it did not have to, because the opponents of the merger did not prove that rail transport of these commodities was insulated from intermodal competition. Another is that the Commission's order must be set aside because of the Commission's failure, *in its report,* to make the necessary (though in fact untenable) finding that the record shows carriage of these commodities to be subject to massive intermodal competition." It is well settled that "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169 (1962).[30]

A third conclusion is that, on the Commission's own terms, its admitted failure to make findings as to the effect of eliminating rail competition for the carriage of the bulk commodities must now be held erroneous. For the District Court, rejecting the Commission's argument, has held that the record does show railroad carriage of these commodities to be substantially insulated from intermodal competition. The court made the following findings, among others, recognizing the ineffectiveness of intermodal competition for this carriage:

> "Railroads have a decided economic advantage in carrying long-haul, heavy bulk products, e.g., phosphate rock mined principally in the western portion of central Florida." FEC App. pp. 18a-19a.

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[30] See also, *e.g., SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943); *Florida* v. *United States,* 282 U.S. 194, 215 (1931).

"While railroads are able to take long bulk-haul business from trucks, barges or water carriers enjoy a considerable cost advantage over railroads. Since shipment by barge takes longer than shipment by rail, the cheaper cost is somewhat offset. The record in this case does demonstrate that barges are not physically interchangeable with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments. See 313 I.C.C. 495 (1961) (railroads able to divert traffic from water carriers even at $1 higher rate than water transportation); 291 I.C.C. 689 (1954) (railroads able to divert traffic from water carriers even at 35 cents higher rate than water transportation). It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida. . . ." FEC App. p. 20a. [31]

The court did not draw the necessary conclusion that the Commission's findings were inadequate. On the other hand, it never found them adequate. [32] And it made clear its view that, on the record presented, it was impossible to "estimate the scope" or "appraise the

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[31] In the *Great Northern* case, see p. 24 n. 16 *supra*, the Commission recognized that, in view of the railroads' inherent advantages in certain types of carriage, including "heavy loading, low-value bulk commodities . . .;" and in "many long-haul movements," "rail transportation must be considered a distinctive market in its own right." Mimeograph opinion, p. 73. The Commission further described rail carriage of such commodities as "substantially noncompetitive" with other modes. *Ibid.*

[32] At no point did the District Court make the necessary determination that the Commission had met its obligation to make adequate findings.

effects" of the monopoly the merger would produce in the carriage of these commodities. While emphasizing that the applicants receive a substantial portion of their revenues from traffic originating in Florida (FEC App. p. 23a), and pointing out that the transportation of nine bulk commodities accounts for some 75 per cent of their business (FEC App. 23a n. 30), the court confessed to an inability, on this record, to "assess the meaning" of a railroad's monopoly on carriage of these commodities (FEC App. p. 20a), or to "predict what action" such a monopolist would take. FEC App. pp. 19a-20a. In other words, one could not "appraise the effects" of the monopoly. The court further stated that the record failed to "show what portion of the merging companies' revenues or profits are generated by the carriage of long-haul products originating in Central and Western Florida." FEC App. p. 23a n. 30.[33] In other words, one could not "estimate the scope" of the monopoly.

In sum, the District Court affirmatively recognized that, on this record, it was not possible for the Commission to make the adequate competitive findings that this Court has directed it to make.

Commission counsel were correct in recognizing that, if the Commission had to make adequate findings as to the effect of eliminating rail competition for carriage of the bulk commodities, it did not do so. Of the nine major commodities, in terms of tonnage, handled by the applicants, which account for some 75 per cent of their combined tonnage, the Commission discussed only one. That was phosphate rock—the No. 1 tonnage

[33] The record does show, however, that only eight points in that area account for about 35 per cent of the applicants' combined total tonnage. See Ex. 36, Statement T, and Ex. 38.

commodity for each of the applicants, and a product originating predominantly within central and western Florida. The Commission said two things about phosphate rock, and they contradict each other. On one hand, the Commission described phosphate rock as "essentially a commodity normally handled by rail." 320 I.C.C. at 151. This was the finding quoted by the District Court. FEC App. p. 21a. It is also the one supported by the record, which discloses, for example, that the railroads have 93.5 per cent of the freight at the phosphate-rock center of Mulberry, and trucks only 6.5 per cent. Ex. H-36, Statement T. On the other hand, the Commission found that "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock. . . ." 320 I.C.C. at 153.[34] It would be difficult to imagine a more clearly inadequate pair of findings than two that contradict each other.

These are the only findings the Commission made with respect to any of the principal bulk commodities for whose carriage the applicants compete in central and western Florida. There is no finding as to the amount of competition (in tonnage or revenue terms) for each or all of the nine principal commodities; no finding as to the relationship between such competition and the applicants' total traffic; no finding as to how much of the traffic for each or all of these commodities

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[34] This finding was based solely on evidence of a minor decrease in the applicants' revenue and revenue per ton on phosphate-rock movements, while tonnage increased. 320 I.C.C. at 153. As the District Court pointed out:

> "This, of course, may only indicate that railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place." FEC App. p. 20a n. 28.

is generated in central and western Florida; no finding as to the nature and effectiveness of the existing competition between the applicants for carriage of each or all of the commodities; and no coherent finding as to the extent to which the transport of any or all of the commodities is susceptible to intermodal competition.

The Commission did not even attempt to estimate the scope of the rail monopoly that would be created by this merger, or to appraise the effects of that monopoly.

3. The Acknowledged Inadequacy of the Record.

The District Court here has found, unequivocally and repeatedly, that the record compiled before the Commission afforded an inadequate basis on which to assess the anticompetitive consequences of the merger. For example, the court declared:

> "The record in the present case gives us no data on which to predict what action will be taken by a railroad possessing a monopoly in the bulk-haul products market of central Florida." FEC App. pp. 19a-20a.
>
> "Before we could assess the meaning of any such monopoly, we would have to know much more about the competition experienced by phosphate rock and its end-products." *Id.* p. 20a.
>
> "The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk products originating in Central and Western Florida. Nor does the record show that effective competition for this type of carriage presently exists in Florida." *Id.* p. 23a n. 30.

Instead of remanding the case to the Commission with directions to make the record complete, the court

was content to place the blame for the incompleteness on the plaintiffs, and particularly the Department of Justice. FEC App. pp. 38a-39a, 36a, 41a n. 36.[35]

The acknowledged inadequacy of the record may not be thus dismissed. It may well be suggested that the applicants, rather than the opponents of the merger, must bear the burden of providing sufficient evidence to enable a meaningful assessment of its anti-competitive effects. Apart from that, however, it is the Commission itself, as the statutory representative of the public interest, which bears the ultimate responsibility for compiling a record adequate and complete with respect to all issues affecting the public-interest determination. When such a record has not been compiled—as the District Court found to be true here—it is the duty of a reviewing court to remand the case to the Commission for that purpose.

The precise point has recently been decided by the Court of Appeals for the Second Circuit. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The court there held that an administrative agency charged with effectuating the public interest may not "act as an umpire blandly calling balls and strikes for adversaries appearing before it" (354 F.2d at 620):

> If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand

[35] The court even took the position that arguments of law, however "able" or "cogent," need not be considered by it where they allegedly had not been made before the Commission. FEC App. pp. 36a, 38a.

> this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision." *Id.* at 612.
>
> "The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." *Id.* at 620.

The court accordingly set aside the FPC's order and remanded the case to it, instructing it to "re-examine all questions on which we have found the record insufficient and all related matters." *Id.* at 624. [36]

Similarily, this Court should remand this case to the Commission with instructions (in addition to correcting the Commission's other errors) to complete the record with respect to the anticompetitive effects of the merger.

4. The Erroneous Denial of the Track-Transfer Condition.

To preserve competition and avoid monopoly in the important rail-freight-generating area of central and western Florida, Southern urged before the Commission that any approval of the merger be conditioned on the transfer to Southern or another suitable railroad, on reasonable terms, of one of the merged company's lines of track running from Jacksonville and the north through Orlando to Tampa and points further south. The Commission's rejection of the proposed condition

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[36] See also *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951), *aff'd by an equally divided Court*, 342 U.S. 950 (1952); *Michigan Consolidated Gas Co.* v. *FPC*, 283 F.2d 204, 226, *cert. denied*, 364 U.S. 913 (1960); Landis, The Administrative Process 39 (1938); Friendly, The Federal Administrative Agencies 144 (1962).

was based on erroneous standards, inadequate findings, and a general disregard of the statutory public interest in the preservation of competition.

The Commission's central error was its application of a standard based on the private interests of the railroads involved and disregarding the public interest in preserving competition. The Commission's main theme was that the proposed condition would involve an "invasion of territory"—territory which the Commission evidently viewed as the private domain of Seaboard and Coast Line whether independent or merged. The Commission stated:

> "Southern has never served the area between Jacksonville and Tampa, and thus the service sought to be rendered by Southern over the lines requested would constitute an invasion of territory now adequately served by the applicants. Moreover, the operations by Southern over the lines requested would deprive the merged company of substantial revenues. Under certain circumstances, we would be warranted in authorizing such an invasion, but where, as here, Southern's loss of traffic and revenue from the merger will be insignificant, the record provides no factual support for granting Southern's request." 320 I.C.C. at 187; see also 320 I.C.C. at 209.

The Commission thus applied a controlling standard of law whereby a track transfer must be disapproved, whatever its effect in preserving competition, if it would result in the "invasion" by one carrier of another carrier's historic "territory"—except perhaps where the condition is required to restore a carrier's "loss of traffic and revenues."

The standard is erroneous. It is self-evidently based on the *private* interest of individual railroads. It ignores the *public* interest in preserving competition.[37] The latter fact is especially clear from the Commission's reliance on the proposition that the territory in question is "now adequately served by the applicants" (320 I.C.C. at 187, 209, quoted at p. 41 *supra*)—as if the adequacy of competitive service "now" offered assurance against the inadequacy of monopolistic service later.

The Commission did, at one point, take its eye off the private interests of the individual railroads and refer to the public. It stated: "In the absence of a public need for additional service, Southern's request must necessarily be denied." 320 I.C.C. at 209. But this reliance on the alleged absence of a public need for "additional" service (evidenced, it seems, by nothing more than the adequacy of existing, competitive service) no less surely ignores the statutory public need for *competitive* service. *Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579, 588 (1st Cir. 1964).

The "public need" standard was an improper one for the Commission to apply in the first place. Its mandate under Section 5(2) is to impose upon a proposed merger such conditions as it finds to be "just and reasonable." 49 U.S.C. 5(2)(b). The error of judging proposed conditions by a "public need" rather than a

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[37] In its first opinion in this case, the District Court, setting aside the Commission's order, disapproved the Commission's consideration of conditions to be attached to its approval of the merger on the basis, among others, that "The Commission's primary concern is the 'public interest,' not 'private interest'." 242 F. Supp. 14, 22; FEC App. pp. 54a, 64a-65a. Although the District Court this time ignored the issue, the Commission's error is still there.

"just and reasonable" standard has been pointed out by the Commission itself in the *Great Northern* case (p. 24 n. 16 *supra*):

> "The standard of section 15(3) of the Act—'a real, specified and substantial need'—is not applicable in determining whether routes should be opened as a condition to approval of a merger. The Supreme Court so held in *Atlantic Coast Line R. Co. v. United States, supra* [284 U.S. 288, 295 (1932)]. In a section 5 proceeding, the standard is whether suggested conditions are 'just and reasonable.' In such a proceeding, the protection of a carrier's long-haul may be far less important than the need to minimize traffic diversion and to insure vigorous competition with a merged company . . ." Mimeograph opinion, p. 57.

In rejecting the proposed condition in this case, the Commission did not consider whether it was "just and reasonable." Neither did it consider "the need . . . to insure vigorous competition with a merged company."

5. The Erroneous Denial of the Divestiture Condition.

Another proposed condition that the Commission refused to attach to its approval of the merger concerned divestiture by the merged carrier of its controlling interest in the Louisville & Nashville Railroad. Control of the L&N is now possessed by Coast Line through ownership of more than 33 per cent of the company's stock, and would be transferred to the merged company by virtue of the merger as approved by the Commission. The merged company and the L&N would have the potential for interchanging a very substantial amount of traffic—more traffic than that which in 1957 produced more than $17 million earned by Seaboard on interchanging 115,000 cars with the L&N,

almost $15 million earned by Coast Line on interchanging 91,000 cars with the L&N, and presumably comparable revenues (not disclosed by the record) earned by the L&N on these interchanges and destined, after the merger, to be returned to the merged company as dividends.

The record leaves no doubt that such favoritism in interchange business would take place between the merged company and the L&N, just as it has between Coast Line and the L&N.[38] To the extent that it did take place, a very substantial volume of interchange business would tend to be foreclosed from competition.

The Commission was willing to assume (as the record required) that the merged company and the L&N would favor each other in the interchange of such traffic:

> "Even if it is conceded that a degree of favoritism in the allocation of interchange traffic may exist between the merged company and the Louisville & Nashville . . . ." (320 I.C.C. at 188);
>
> ". . . even assuming a disposition on the part of the merged company to favor the Louisville & Nashville" (320 I.C.C. at 189).

But even if such "a degree of favoritism" did exist, the Commission held,

> ". . . we are convinced that the conditions prescribed herein will prove adequate to protect competing railroads against significant traffic diversion. . . . Because of these and other factors, we

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[38] The top executives of the merging companies stated quite candidly that the merged company would favor the L & N to the extent it could do so consistently with good business judgment—that the L & N would be favored if it was on a competitive par with competing railroads. Tr. 474, 550-551, 1286-1287; Statement A, p. 31; Statement M, p. 13.

> conclude that it is *not necessary in the public interest* to require Coast Line or the merged company to divest itself of stock in the Louisville & Nashville . . . ." 320 I.C.C. at 188-90 (emphasis added).

There are at least three reasons why the Commission's conclusion cannot stand. The first is its application of an erroneous standard requiring that the proposed condition be "necessary in the public interest." As pointed out at pp. 42-43 *supra*, the proper standard, embodied in the language of Section 5(2) and recognized by the Commission in the *Great Northern* case, requires the Commission to impose such conditions "as it shall find to be just and reasonable."

The second reason is the patent inadequacy of the Commission's findings with respect to the potential favoritism. There is nothing in the report to indicate what "degree of favoritism" the Commission was conceding when it concluded that the conditions it prescribed would nevertheless be adequate to forestall "significant traffic diversion." There is no way of knowing whether, if the Commission had found the quantity and quality of favoritism compelled by this record, it would still have thought its conditions to be adequate and the proposed divestiture to be "not necessary in the public interest."

The final reason is the Commission's failure to take account of, or even mention, the antitrust implications of the relationship between the merged company and the L&N as affecting the traffic available for interchange between them. These implications are indicated by, among many other authorities, *United States* v. *DuPont & Co.*, 353 U.S. 586, 607 (1957), where this Court stated:

> "The statutory policy of fostering free competition is obviously furthered when no supplier has

> an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute."

See also *International Salt Co.* v. *United States*, 332 U.S. 392, 397 (1947). Since the Commission altogether failed to consider this policy in the context of its "findings" on favoritism, its decision to reject the proposed condition was not based on an application of the proper standards required by the policies of the antitrust laws."[29]

6. The Public Benefits of the Merger Weighed Against the Public Harms.

The "ultimate question" in this case, as stated in the *per curiam* opinion of this Court, is "whether the merger would be consistent with the public interest despite the foreseeable injury to competition." 382 U.S. at 165; FEC App. p. 52a. On the present record the Commission could not properly answer this question in the affirmative. Incomplete as the record is, it demonstrates a foreseeable injury to competition which so clearly outweighs the public benefits expected to result from the merger that, in any proper "accommodation of § 5(2) and the antitrust legislation," and any proper consideration of the value of competition as an element of the public interest under § 5(2), the Commission could not decide on this record to approve this merger.

The savings expected to result "from the elimination of duplicate facilities and functions" were characterized by the Commission as "foremost among the bene-

[29] It should be noted that the District Court has not dealt with this question in either of its opinions. So far as one can tell, there has been no court review of the issue.

fits" to be realized from the merger. 320 I.C.C. at 206-07. These savings were estimated to "approximate at least $20 million a year before taxes." 320 I.C.C. at 207. The Commission failed, however, to consider how much of these savings could be realized by consolidation of facilities without merger—such as the $2,545,991 that Seaboard and Coast Line were expected to save annually by use of the joint classification yards which they proposed to construct at Jacksonville jointly but without merging.[40] In contrast to its complete disregard here of the savings realizable without merger, the Commission in *Great Northern* (p. 24 n. 16 *supra*) considered the subject in detail and determined that "not less than one-third, or approximately $5,282,267, of the estimated savings totalling $15,846,802 could be realized without merger." Mimeograph opinion, p. 62.

In general, the Commission cannot conceivably determine "whether the merger would be consistent with the public interest despite the foreseeable injury to competition" (382 U.S. at 165; FEC App. p. 52a) without first determining and making findings on the foreseeable injury to competition. The injury to competition can be foreseen and evaluated only by complying with the obligation, imposed by *McLean*, to "estimate the scope and appraise the effects of the curtailment of competition" resulting from the merger. The Commission's failure in this case to carry out this responsibility, particularly with regard to central and western Florida and the transportation of heavy bulk-

[40] See Examiner's Report, p. 25, printed in Jurisdictional Statement of Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, *et al.*, No. 425, October Term, 1965, App. E, App. vol. II, p. 39.

loading commodities, makes impossible any meaningful determination of the public interest. It fatally infects the Commission's orders.

CONCLUSION

For the reasons set forth above, we respectfully submit that probable jurisdiction should be noted.

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